Supreme Court, U.S.
FILED
OCT 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-379

In the Supreme Court of the United States

OCTOBER TERM, 1986

DONNA K. DOWD, et al. and
CATHERINE ELLIS, et al.,
Petitioners,

vs.

TEXTRON, INC. and
BELL HELICOPTER TEXTRON, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents Textron, Inc. and its subsidiary, Bell Helicopter Textron, Inc. ("Bell") respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari in this matter.

STATEMENT OF THE CASE

This case involves the crash of an AH-1S(MC) Cobra attack helicopter produced by Bell pursuant to a 1978 contract with the United States Army. The opinion of the United States Court of Appeals for the Fourth Circuit in this case is reported at 792 F.2d 409 and is included as

Appendix B to the Petition. Section I of that opinion contains a concise and accurate summary of the relevant facts. Respondents respectfully submit that the Fourth Circuit's statement of the facts is a far more accurate account than that set forth in the Petition.

In 1978 Bell and the United States Army entered into a Modification Contract for the conversion of AH-1G Cobras to AH-1S(MC) Cobras, a more powerful version of the Cobra. The helicopter involved in this action was one of those converted. Pursuant to that contract, the Army specified that Bell install the 540 rotor system on the helicopters, a two-bladed teeter rotor system with which the Army had a great deal of experience prior to 1978. Indeed, as the Fourth Circuit noted, the Army's decision in 1978 to require installation of the 540 rotor system on the AH-1S Cobra was made "in an atmosphere of awareness and in the light of experience." 792 F.2d at 412.

Bell designed the 540 rotor system in the 1960's and "[t]he Army had been using helicopters equipped with the teeter rotor system for some twenty years" before the accident that gave rise to this suit. *Id.* Almost 9000 helicopters equipped with the teeter rotor system flew in Vietnam, *id.*, and the Army had investigated and analyzed numerous incidents of mast bumping in helicopters equipped with this rotor system. As early as 1973, the Army prepared its own report on 46 accidents resulting from mast bumping and concluded that the teetering rotor system had inherently unstable characteristics. 792 F.2d at 411.[1]

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1. As the Fourth Circuit noted, mast bumping occurs when the rotor dips at an extreme angle while the mast remains stationary, resulting in the hub of the rotor striking and perhaps severing the mast. When this occurs, the rotor separates from the mast and the helicopter cannot fly. 792 F.2d at 410.

During the 1970's, Bell made various proposals to the Army for possible modifications of the 540 rotor system to reduce mast bumping. The Fourth Circuit noted that "[t]he record suggests various reasons why the Army did not adopt Bell's proposed modifications: the modifications were thought ineffective or too costly, or would have interfered with the military mission of the helicopter by impairing performance because of additional weight the modifications might add." 792 F.2d at 411. Moreover, despite the risk of mast bumping in the 540 rotor system, the statistical evidence demonstrated that such a two-bladed teeter rotor system was safer than a non-teeter rotor system. Whatever the Army's ultimate reason, it made a military judgment to continue use of the 540 system, and Bell had no choice but to abide by that judgment.

Accordingly, in 1978 the Army and Bell entered into a contract for the modification of AH-1G helicopters to AH-1S helicopters with no significant change in the 540 rotor system. 792 F.2d at 411. As the district court recognized and the Fourth Circuit noted, under this contract, "the Army did not request or order installment of any of the available safety devices mentioned above, despite knowing something of the existence and/or efficacy of these devices; and finally, Bell was not allowed under the contract to install such devices without the permission of the Army." 792 F.2d at 412.

The record clearly demonstrates that the United States Army made an informed judgment in 1978 to continue to install the 540 rotor system on attack helicopters designed to accomplish sophisticated military objectives. It is within the context of this judgment that petitioners' argument must be assessed.

REASONS FOR DENYING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION IN THIS CASE IS CORRECT UNDER ANY STANDARD FOR THE MILITARY CONTRACTOR DEFENSE.

While the Petition contains a vigorous assault upon the decision of the Fourth Circuit, petitioners fail altogether to offer this Court any reasonable standard for the military contractor defense that would not compel entry of judgment for respondents. Respondents respectfully submit that, under any standard for the military contractor defense adopted by the various Circuit Courts, the conclusion that respondents were entitled to judgment is correct.

The Fourth Circuit adopted a standard for the military contractor defense substantially identical to the standard previously adopted by the Third, Fifth, Seventh, and Ninth Circuits. *See McKay v. Rockwell International Corp.*, 704 F.2d 444, 449-50 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 354-55 (3d Cir.), *cert. denied*, 106 S. Ct. 72 (1985); *Tillett v. J.I. Case*, 756 F.2d 591, 597 (7th Cir. 1985); *In Re Air Crash Disaster at Mannheim, Germany*, 769 F.2d 115, 121 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 851 (1986); *Bynum v. FMC Corp.*, 770 F.2d 556, 565 (5th Cir. 1985); *Tozer v. LTV Corp.*, 792 F.2d 403, 408 (4th Cir. 1986). As originally set forth in *McKay*, a military contractor is insulated from liability for injuries to servicemen arising from alleged design defects in military equipment if:

> (1) The United States is immune from liability under *Feres* and *Stencel*, (2) the supplier proves that the

> United States established, or approved, reasonably precise specifications for the allegedly defective military equipment, (3) the equipment conformed to those specifications, and (4) the supplier warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States.

704 F.2d at 451. The Fourth Circuit, like the Third, Fifth, and Seventh Circuits before it, adopted the *McKay* standard virtually unchanged in a decision announced the same day as the decision in this action, *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986), and applied that standard in this case.

It is difficult to determine from the Petition whether petitioners are challenging the legal standard adopted by the Fourth Circuit for the military contractor defense or, instead, are simply arguing that the standard was misapplied by the Court in this case. In either event, however, petitioners would be incorrect.

Focusing upon the legal standard adopted by the Fourth Circuit, petitioners actually appear to embrace the standard for the military contractor defense set forth in *McKay*. *See* Petition, at 14. Petitioners apparently believe that the *McKay* standard is correct, but that the Fourth Circuit altered it by removing the burden of proof from the defendant. This is patently incorrect. The Fourth Circuit expressly held that "[t]o avoid liability under the military contractor defense, *Bell must demonstrate* that it has met the requirements outlined in *Tozer*." 792 F.2d at 411. (Emphasis added). Based on a careful review of the record, the court concluded that Bell had

met its burden of proving each of the elements of the defense.[2]

To the extent that petitioners are challenging the application of the military contractor defense to the facts of this case, their argument is also incorrect. Petitioners focus upon the original design of the 540 rotor system in the 1960's, rather than upon the 1978 contract that led to the production of the AH-1S(MC). The Fourth Circuit correctly rejected petitioners' arguments in this regard. There is no question but that Bell originally designed the 540 rotor system. By the time the 1978 contract was executed, however, the United States Army was intimately familiar with the 540 rotor system based on twenty years of service in thousands of helicopters. The Fourth Circuit correctly determined that the informed decision by the Army in 1978 to install the 540 rotor system on the AH-1S(MC) was the proper point for evaluating the application of the military contractor defense, and petitioners offer no reason why this determination should be reversed by this Court.[3]

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2. At another point, petitioners appear to assert that a military contractor should only be insulated from liability when it can establish that it was *compelled* by the government to design and manufacture a product in a particular manner. *See* Petition, at 12-13. Not only does this argument rely on outdated legal authorities, but, more importantly, it does nothing to aid petitioners. Under the 1978 contract at issue in this case, it is clear that Bell was in fact compelled to install the 540 rotor system, without modification, to the helicopter involved in this case.

3. Petitioners also devote a great deal of attention to the fact that the 540 rotor system was patented by Bell when it was originally developed, although the purported legal significance of this fact is unexplained. Given the Fourth Circuit's correct determination that the 1978 contract was the proper point for evaluating the military contractor defense, the fact that the design was patented by Bell is irrelevant to determining whether Bell established the elements of the defense.

Significantly, even the district court agreed that, if the 1978 decision of the Army controlled, the military contractor defense would insulate Bell from liability in this action. Indeed, the district court explained that, if the case were viewed by reference to the 1978 contract, "this case would never have gone to trial. There was never any contention that Bell was negligent in the mere act of installing this particular rotor system pursuant to the modification contract." (Memorandum opinion, Appendix A to Petition, p. 8). Like petitioners, however, the district court erroneously focused on the original design of the 540 rotor system. The Fourth Circuit rejected this approach, reasoning that "[i]f, as the district court intimated, design of the original equipment fixed Bell's negligence for the indefinite future, Bell's incentive to propose safety modifications for its product might will be undermined. Much machinery undergoes safety refinements during the course of its useful life, and we see every reason to encourage such an evolution in military equipment." 792 F.2d at 412. Thus, the Fourth Circuit concluded that the proper focus was upon the 1978 contract.

Finally, respondents are aware that the Eleventh Circuit Court of Appeals has established a standard for the military contractor defense that is markedly different from that set forth in *McKay* and adopted by the Fourth Circuit in *Tozer* and this case. *See Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir.), *petition for cert. filed*, 54 U.S.L.W. 3632 (U.S. Mar. 17, 1986) (No. 85-1529).[4] Even

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4. Respondent Bell Helicopter Textron, Inc. is one of the amici curiae who have submitted a brief in support of Grumman Aerospace Corporation's pending petition for certiorari in *Shaw*. As explained in that brief, the *Shaw* standard for the military contractor defense is completely unworkable when applied to a

(Continued on following page)

under the standard set forth in *Shaw*, however, the military contractor is insulated from liability if it proves "that it timely warned the military of the risks of the design and notified it of alternative designs reasonably known by the contractor, *and* that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design." 778 F.2d at 746 (emphasis in original). When applied to the 1978 contract at issue in this case, the *Shaw* standard is met. This case does not involve a design contract for a new product, but instead involves a decision by the military to order installation of a component part with which it had substantial experience. As the Fourth Circuit explained, the United States Army was fully aware of the possible dangers of the 540 rotor system in 1978, having conducted its own detailed investigation into the causes of mast bumping, and Bell clearly notified the Army of modifications that could be made to the 540 rotor system. Nonetheless, the Army chose to require the installation of the unmodified 540 rotor system in the AH-1S(MC). Thus, even under the standard of *Shaw*, the Fourth Circuit's judgment in this case was unquestionably correct.

In summary, the Fourth Circuit decided, based on the uncontroverted facts in the record, that the decision of the United States Army in 1978 to require installation of the 540 rotor system in the AH-1S(MC) Cobra was the critical event for determining application of the mil-

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Footnote continued—

contract for the design of a weapons system, because it mandates judicial second-guessing of the military's knowledge and expertise in deciding whether to accept a design. The present case is substantially different, however, based on the Army's extensive experience with the 540 rotor system, and the Army's undisputed knowledge of the problem of mast bumping, before entering into the contract at issue.

itary contractor defense. Petitioners offer this Court no reason to reject this legal conclusion. Respondents submit that they established the elements of the military contractor defense as a matter of law with regard to the 1978 contract, and the Fourth Circuit's determination that judgment should be entered in respondents' favor should not be disturbed.

II. THERE WAS NO DEPRIVATION OF THE RIGHT TO TRIAL BY JURY.

Petitioners' suggestion that the Fourth Circuit's decision deprived them of the right to trial by jury is not only unsupported in petitioners' argument, but is absurd on its face. As noted above, even the district court recognized that, if the proper focus were the 1978 contract, "this case never would have gone to trial." There simply was no issue to be tried when the elements of the military contractor defense were evaluated by reference to the Army's 1978 decision. Accordingly, once the Fourth Circuit determined that the Army's 1978 decision was the controlling event, the entry of judgment in favor of respondents was clearly correct.

CONCLUSION

For the reasons set forth above, respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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